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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JACK K. IV, a Person Coming Under  
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ELIZABETH H.,

Defendant and Appellant.

D060732

(Super. Ct. No. SJ10494D)

APPEAL from orders of the Superior Court of San Diego County, David B.  
Oberholtzer, Judge. Affirmed.

Elizabeth H. appeals a juvenile court order denying her Welfare and Institutions  
Code section 388<sup>1</sup> petition, in which she sought the return to her of custody of her son,  
Jack K. IV. She also appeals orders terminating her parental rights to Jack IV. She

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<sup>1</sup> Statutory references are to the Welfare and Institutions Code.

contends the court abused its discretion by denying her petition and erred by not applying the beneficial parent-child relationship exception or the sibling relationship exception to termination of parental rights and adoption. We affirm the orders.

## FACTUAL AND PROCEDURAL BACKGROUND

In September 2009, the San Diego County Health and Human Services Agency (the Agency) petitioned on behalf of infant Jack IV, alleging Elizabeth was mentally ill and developmentally delayed; Jack IV's father, Jack K. III, had a history of extreme domestic violence and was untreated; Elizabeth and Jack III minimized their domestic violence and had long histories of substance abuse and relapses; Elizabeth had another child who was a dependent with whom she had not reunified; and the parents had not reunified with older children.

The family had had more than 50 past referrals to child protective services. Elizabeth and Jack III's four older children, Mark K., Matthew K., Desiree K. and Damien K., had been subjects of the Agency's involvement in 1998 based on Elizabeth's substance abuse and her failure to protect Desiree from sexual abuse by the maternal grandfather. Elizabeth had allowed Desiree and Damien to live with the maternal grandfather even though he had sexually and physically abused Elizabeth and her sister when they were children. Mark and Matthew had been in a guardianship with the paternal grandmother and she became the guardian of Desiree and Damien as well.

In September 2008, Elizabeth and her boyfriend Kenneth I.'s seven-year-old child, Summer I., and Skylar I., another child of Kenneth's from a different mother, had become

dependents of the court because of domestic violence, drug abuse, poor living conditions and medical neglect.

Elizabeth reported she had begun using methamphetamine when she was 15 years old, and she had used drugs off and on for 19 years until she became sober in July 2008. She had an extensive history of extreme domestic violence and said many of the violent incidents involved her children. Kenneth was physically abusive toward the children and he and Elizabeth made inappropriate sexual gestures in their presence. Skylar said she had seen Elizabeth have sex with several men in the home. After a domestic violence incident in August 2008, Elizabeth left Summer and Skylar with Kenneth and hitchhiked to Oklahoma.

The psychologist who conducted an evaluation of Elizabeth reported she has major depressive disorder, posttraumatic stress disorder, personality disorder and below average intellectual functioning; she becomes preoccupied with her own needs at the expense of others and she is ineffective in solving problems.

Elizabeth participated in reunification services in Summer's case, but she lied to the social worker and minimized how much contact she had with abusive men. In November 2010, the court terminated Elizabeth's parental rights to Summer.

In November 2009, the court found the allegations of the petition regarding Jack IV to be true, but allowed him to remain in Elizabeth's care with family maintenance services. However, in March 2010, the Agency filed a supplemental section 387 petition, alleging Elizabeth had taken Jack IV with her to panhandle two times, where she was hours from home with no supplies for him. Two weeks earlier Jack IV had had surgery

to his genital area and needed to be changed frequently and antibiotic cream applied to prevent infection. Elizabeth had no diapers or antibiotic cream with her. The petition also alleged she had left Jack IV with Kenneth, who remained untreated for drug abuse and domestic violence. The social worker said Elizabeth's mental health problems impeded her ability to understand a child's needs and provide safe care.

The court ordered Jack IV detained. It found the allegations of the petition true, ordered Jack IV placed in foster care and ordered reunification services.

In August 2010, the Agency petitioned under section 388, requesting the court terminate Elizabeth's services because her visits with Jack IV were inconsistent and she was not making progress in therapy. The Agency later withdrew the petition and determined to proceed by way of the six-month review hearing.

At the six-month review hearing in December 2010, the court terminated services in Jack IV's case and set a section 366.26 hearing to determine a permanent plan. The social worker assessed Jack IV as an adoptable child. She said he was healthy and developmentally on target, his caregivers wanted to adopt him and numerous other families were interested in adopting a child with his characteristics.

In July 2011, Elizabeth petitioned under section 388, requesting the court to place Jack IV in her care with family maintenance services, or order additional reunification services.

In September 2011, at the hearing on Elizabeth's petition and the section 366.26 hearing, the court considered testimony of witnesses and the documentary evidence. It found Elizabeth had shown a change of circumstances, but it would not be in Jack IV's

best interests to place him with Elizabeth or reinstate services. After further argument, the court found Elizabeth had not shown the presence of any of the statutory exceptions to termination of parental rights and adoption. It terminated parental rights, referred the matter for adoption and designated the foster parents as the prospective adoptive parents.

## DISCUSSION

### I

Elizabeth contends the court abused its discretion by denying her section 388 petition. She asserts she showed her circumstances had changed and it would be in Jack IV's best interests to be placed with her. She argues she has maintained positive contact with him, and reunification would allow him to be raised by his biological family, continue his contact with his sister, Desiree, and get to know his other siblings.

After a court has terminated reunification services, "the focus shifts to the needs of the child for permanency and stability. . . ." (*In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1800.) However, "[e]ven after the focus has shifted from reunification, the [statutory] scheme provides a means for the court to address a legitimate change of circumstances while protecting the child's need for prompt resolution of his custody status." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

A change of circumstances may be brought to the court's attention through a petition under section 388. Section 388 provides in part:

"(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside

any order of court previously made or to terminate the jurisdiction of the court. [¶] . . . [¶]

"(d) If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held. . . ."

In order to gain the relief sought in a section 388 petition, the petitioner must show both a change of circumstances or new evidence and that the change sought is in the minor's best interests. (§ 388; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) The petitioner bears the burden of proof to make both showings. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

In *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530-532, the appellate court listed three factors a court might consider when determining if a child's best interests would be served by granting a section 388 petition: (1) the seriousness of the problem that led to the dependency and the reasons for any continuation of the problem; (2) the strength of the bond between the child and the caretaker; and (3) the degree to which the problem may be removed and the degree to which it has been removed.

"The [section 388] petition is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) A reviewing court will not disturb a court's discretionary ruling in a dependency proceeding " ' "unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]." ' ' " (*In re Stephanie M., supra*, 7 Cal.4th at p. 318.)

The court did not err by finding Elizabeth did not show that placing Jack IV with her would serve his best interests. Elizabeth did not show she was capable of providing Jack IV with adequate care. She had not made progress in therapy since Jack IV's removal. Her therapist reported she was not taking responsibility, was projecting blame and lied about contact with Jack III. When Jack IV had lived with Elizabeth during the first months of his life, she had taken him with her when she panhandled, neglecting to have with her the necessary supplies to care for his surgical wounds. Although she was drug free and attending domestic violence group sessions and could articulate some risks of domestic violence, she had continued contact with both Kenneth, who had not been treated for domestic violence, and with Jack III, who had domestic violence incidents with his current wife and continued to use drugs.

Elizabeth did not show she could provide a stable home for Jack IV. At the time of the hearing, he was two years old and had been under the court's protection since birth. He had lived in a homeless shelter with Elizabeth for the first six months of his life, then was in a foster home for four months and moved to a second foster home at 10 months. After Jack IV was removed from Elizabeth's care, she had lived with her Narcotics Anonymous sponsor from December 2010 until March 2011. After she left that home, she stayed with various friends. Then, she was accepted to a homeless shelter short-term transitional housing program. At the hearing in September 2011, she stated she was no longer living in transitional housing, and her daughter, Desiree, testified she did not know where Elizabeth was living. Elizabeth testified she planned to live with the paternal grandmother if Jack IV were returned, but according to Desiree, Elizabeth had not been

there recently, and the grandmother did not indicate to the social worker that she knew of this plan. Elizabeth recently had been away from San Diego for three weeks to work, but did not inform the social worker she would be gone, and did not call Jack IV's foster parents to ask about him during her absence. Also, she said she had recently quit her job because she was not making enough money. Elizabeth had not been able to stabilize her life.

Elizabeth had pleasant one-hour weekly supervised visits with Jack IV, but at the end of visits, Jack IV easily separated from her. He had lived with his foster parents for more than one year and looked to them to provide all of his daily needs and comfort. They wanted to adopt him and make him a permanent member of their family. In view of Elizabeth's long history of parental neglect and domestic violence and instability and Jack IV's relationship with his caregivers, Elizabeth has not shown the court abused its discretion by denying her section 388 petition.

## II

Elizabeth asserts the court reversibly erred by terminating her parental rights because she showed the beneficial parent-child relationship exception to termination of parental rights and adoption of section 366.26, subdivision (c)(1)(B)(i).

Adoption is the permanent plan favored by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds by clear and convincing evidence that a child is adoptable, it becomes the parent's burden to show that termination of parental rights would be detrimental to the child because a specified statutory exception exists. (*Id.* at p. 574.) Under the exception found in section 366.26, subdivision (c)(1)(B)(i), the



parent is required to show termination would be detrimental in that "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." In *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534, the court noted "[c]ourts have required more than just 'frequent and loving contact' to establish the requisite benefit for [the] exception." In interpreting the meaning of "benefit" in section 366.26, subdivision (c)(1)(B)(i), this court stated: "In the context of the dependency scheme prescribed by the Legislature, we interpret the 'benefit from continuing the [parent/child] relationship' exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn*, at p. 575.)

In reviewing whether there is sufficient evidence to support the trial court's finding, the appellate court reviews the evidence in the light most favorable to the trial court's order, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

Assuming Elizabeth maintained regular visitation and contact with Jack IV, she did not show they shared a parent-child relationship that was so beneficial to him that he would suffer great harm if her parental rights were terminated. Two-year-old Jack IV had been out of Elizabeth's care since he was six months old. Their visits together remained supervised. Although Jack IV was happy during the visits, he separated easily from Elizabeth when visits ended and showed no distress. By contrast, he was bonded to his foster parents and became very excited when he saw them. Elizabeth did not show

the benefit of maintaining the parent-child relationship would outweigh the benefits to Jack IV of a stable, permanent adoptive home so that termination of parental rights would greatly harm him.

### III

Elizabeth maintains the court erred by not finding the sibling relationship exception to termination of parental rights of section 366.26, subdivision (c)(1)(B)(v) applied in this case. She argues Jack IV had spent a lot of time with his 20-year-old sister, Desiree, and it would be detrimental to him to sever this relationship.

Under section 366.26, subdivision (c)(1)(B)(v), if the court finds the child will be adopted within a reasonable time, adoption must be ordered " 'unless the court finds a compelling reason for determining that termination [of parental rights] would be detrimental to the child' because '[t]here would be substantial interference with a child's sibling relationship . . . .' [Citation.]" (*In re Daniel H.* (2002) 99 Cal.App.4th 804, 811.) The purpose of this exception is to preserve long-standing sibling relationships that serve as "anchors for dependent children whose lives are in turmoil." (*In re Erik P.* (2002) 104 Cal.App.4th 395, 404.) "The sibling relationship exception contains strong language creating a heavy burden for the party opposing adoption." (*In re Daniel H.*, at p. 813.) Factors for the court to consider include the nature and extent of the sibling relationship; whether the siblings were raised in the same home; whether they share a close bond; and whether continued contact is in the child's best interests, as compared to the benefits of adoption. (*Ibid.*) The court considers the best interests of the adoptive child, not the best interests of the other siblings. (*Ibid.*)

Elizabeth did not show Jack IV would suffer severe detriment from severing his sibling relationship with Desiree. They had positive weekly supervised visits, but they had never lived together, they had very few shared experiences and there was a great gap in their ages. There was no evidence presented that Jack IV would suffer great harm if he did not have further contact with Desiree or that the benefits of their relationship would outweigh the benefits to Jack IV of a secure and stable adoptive home. The court did not err by not applying the sibling relationship exception to termination of parental rights and adoption.

#### DISPOSITION

The orders are affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

NARES, J.